In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-37

COVERT MARINE, INC., et al.,
Petitioners,

vs.

OUTBOARD MARINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SHERIDAN MORGAN
400 Two Crown Center
2420 Pershing Road
Kansas City, Missouri 64108

WILLIAM M. AUSTIN
WELCH & AUSTIN
1111 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Authorities

CASES

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

COVERT MARINE, INC., et al.,
Petitioners,

vs.

OUTBOARD MARINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 12, 1979.

JURISDICTION

Jurisdiction to review the judgment below by Writ of Certiorari is conferred by Rule 19(6) of the Supreme Court: The United States Court of Appeals For The Seventh Circuit "* * * has decided a federal question in a way in conflict with applicable decisions of this Court * * *."

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was dated April 12, 1979, and the time of its entry was April 12, 1979.

QUESTION PRESENTED

Can a Consent Judgment entered in a case that was never tried and in which there were not any findings of fact nor conclusions of law confer immunity on the defendant from civil liability for future violations of the Federal Anti-Trust Laws under the Doctrine of Res Judicata?

STATUTES INVOLVED

The statutory provisions involved in this appeal are found in 15 U.S.C. Sections 1, 2, 15 and 26 (Supp. V, 1975), the pertinent parts of which are as follows:

Section 1. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *."

Section 26. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immedate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

STATEMENT OF THE CASE

This is a private antitrust action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26 to prevent and restrain violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Petitioner-Wholesalers are, and long have been, distributors of Respondent Outboard Marine Corporation's ("OMC") marine replacement parts and marine accessories. Petitioner-Retailers are retail marine dealers

who have engaged in the business of purchasing replacement parts for Johnson and Evinrude outboard motors from independent wholesale distributors.

Respondent Outboard Marine Corporation (hereafter called "OMC") is and for many years past has been, engaged in the business of manufacturing, distributing and selling marine products in interstate commerce throughout the United States. The marine products manufactured, distributed and sold by OMC in interstate commerce include outboard motors which are and always have been its principal product. OMC markets its marine products under various trademarks and trade names, including the trade names "Johnson" and "Evinrude." OMC is, and for many years past has been, engaged in the business of manufacturing, distributing and selling replacement parts and marine accessories for its outboard motors in interstate commerce. Such replacement parts and marine accessories are marketed by OMC under the trade names "Johnson," "Evinrude" and "OMC." OMC did sell to the independent wholesale distributors, including Petitioners, located in the United States east of the Rockies area a full line of the replacement parts needed to repair and service Johnson and Evinrude outboard motors until September 30, 1978, at which time it refused to deal thereafter with any independent wholesale distributor.

OMC has been and remains the world's largest manufacturer of outboard motors.

In the past ten (10) years, OMC has manufactured and sold over $2-1/2 billion worth of marine products, replacement parts and marine accessories.

Mercury and Chrysler are the only manufacturers other than OMC that market outboard motors in a full line of horsepower ratings.

The Evinrude and Johnson divisions of OMC sell outboard motors under their respective brands to separate dealer organizations, each of which consists of approximately 3,000 franchised dealers.

OMC is the only manufacturer of ninety-nine percent (99%) of replacement parts needed to repair and service the Johnson and Evinrude outboard motors manufactured by it.

Persons other than Johnson dealers and Evinrude dealers, such as independent marine repair shops, marinas, yacht houses and dealers in outboard motors manufactured by persons other than OMC, also are engaged in the business of repairing and servicing outboard motors, and must have access to replacement parts for outboard motors to remain viable.

Replacement parts and marine accessories for outboard motors manufactured by OMC were until September 30, 1978, and for many years past have been, distributed through independent wholesale replacement parts distributors. Independent wholesale replacement parts distributors purchased such replacement parts and marine accessories from OMC. Independent wholesale replacement parts distributors sold such replacement parts and marine accessories to such retail dealers in competition with OMC since 1967.

On or about May 7, 1971, OMC publicly announced a program under which it would cease to sell OMC replacement parts and marine accessories to independent wholesale distributors and would expand its own wholesale distribution system for replacement parts and marine accessories in the United States east of the Rockies area. OMC sent a letter on or about May 7, 1971, to all independent wholesale distributors in the United States east of the

Rockies area, then numbering fourteen (14), stating to each distributor that it would not enter into an agreement with that distributor for any term extending beyond a certain date set forth in that letter.

The present Petitioner-Wholesalers did in 1971 sue the Respondent OMC to enjoin their termination as OMC Parts Distributors, which suit was settled without trial and without findings of facts or conclusions of law. Accordingly, a Consent Judgment was entered in 1972 extending the Petitioner-Wholesalers' Distributorship Contracts for six (6) years to September 30, 1978. (See Appendix 5)

By letters in September, October and November of 1976 Respondent OMC notified all retail dealers that after September 30, 1978 it would refuse to sell OMC replacement parts to any independent wholesale distributors, including Petitioners, and that thereafter retail dealers would be required to purchase OMC replacement parts from co-conspirator depots and co-conspirator depots to be created in the future.

This action was commenced on February 2, 1977 in the Federal District Court, Western District of Missouri; the Respondent filed a Motion to Dismiss.

On June 13, 1978, the Federal District Court, Western District of Missouri, transferred this matter to the United States District Court for the Northern District of Indiana, Fort Wayne Division. No pre-trial discovery has been had in this matter.

Petitioners moved for preliminary injunctive relief on May 31, 1978. That motion requested that the Court order OMC, pendente lite:

(1) to continue to sell replacement parts and marine accessories to Petitioner-Wholesalers;

(2) to continue to deal with Petitioner-Wholesalers in accordance with the course of dealings established between OMC and Petitioners in past years;

(3) not to refuse to sell replacement parts and marine accessories to Petitioner-Wholesalers; and

(4) not to terminate Petitioners as wholesale distributors of replacement parts and marine accessories pursuant to the announcements of September, October and November of 1976, or any subsequent announcement, or any provision for termination in the existing distributor agreements between OMC and Petitioners or any distributor agreement entered into between OMC and any Petitioner during the pendency of this action.

Petitioners in their request for preliminary injunction did not request that Respondent OMC be inhibited from expanding its own distribution system for replacement parts and marine accessories.

The question presented was whether a preliminary injunction should issue permitting Petitioner-Wholesalers to continue in their businesses until this action was tried and a final decision rendered by the Court.

A hearing was held, briefs submitted and on the 25th day of September, 1978, the District Court denied the Motion For Preliminary Injunction, holding that Petitioner-Wholesalers were barred from proceeding in this action by the doctrine of Res Judicata based upon the Consent Judgment entered in the previous action between Petitioner-Wholesalers and Respondent-OMC. Upon appeal to the United States Court of Appeals for the Seventh Circuit, the District Court's Judgment of Res Judicata was affirmed.

RESPONDENT-OMC'S POSITION IN OUTBOARD MARINE INDUSTRY

The outboard marine industry consists of three tiers:

1. Manufacturing,
2. Wholesale Distribution, and
3. Retail dealers who serve the consuming boating public.

The primary product which is the subject of the outboard motor industry is outboard motors.

There exists an "after market" in the outboard motor industry. The "after market" in the outboard motor industry consists of replacement parts and marine accessories.

The difference between a marine accessory and a replacement part is that the part is necessary in the operation of the motor and an accessory is not necessary in the operation of the motor.

Respondent-OMC's position in the outboard motor industry is and has been since 1930 the world's largest manufacturer of outboard motors having a market share ranging from 50% to 67% and directly markets its products as Johnson Outboard Motors and Evinrude Outboard Motors to retail dealers.

There are approximately 20,000 service replacement parts for Johnson and Evinrude Outboard Motors and OMC is the only source of 99% of replacement parts for Johnson and Evinrude Outboard Motors.

There are approximately 12,000 marine dealers in the United States, of which 6,500 are either Johnson or Evinrude Outboard Motor dealers and all 12,000 dealers must

have access to replacement parts for Johnson and Evinrude Outboard Motors because that service is vital to a viable dealership.

From 1927 to 1966 OMC exclusively marketed and distributed its replacement parts and marine accessories through independent wholesale distributors who in turn sold to retail dealers. Beginning in 1967 the Respondent began establishing wholly owned corporate subsidiaries which are wholesale distributors of OMC replacement parts and marine accessories and are referred to herein as "depots". Thus the Respondent established a dual wholesale distribution system, which continued to exist until September 30, 1978, although the independent wholesale distribution system had given satisfactory service.

The marketing and distribution of replacement parts for Johnson and Evinrude Motors was a competitive market until September 30, 1978. The competition was in service level, pricing and promotion, cash discounts and rebates and credit terms and free freight and free telephone service.

Marine retail dealers also sell marine accessories to the public.

Marine accessories are high profit items.

OMC evidenced little interest in marine accessory items until 1970 when OMC decided to eliminate the independent wholesale distribution system in order to attain a monopoly in the wholesale distribution of OMC replacement parts and thereby to gain a competitive advantage in the marine accessory market. If OMC becomes the only source of replacement parts for Johnson and Evinrude Motors, the retail dealer will be pressured to buy marine accessories from OMC to protect his supply of replacement parts.

Prior to May 23, 1972 OMC did not market or sell marine accessories that it did not manufacture or private label. It was not until 1970 that OMC contemplated expanding entry into the marine accessory market by including marine accessories it neither manufactured nor private labeled. This was to be accomplished by taking over the complete distribution of its replacements parts.

Subsequent to the aforesaid May 23, 1972 Consent Judgment, the Respondent and the then existing co-conspirator depots were joined by additional co-conspirator depots and the Respondent and the co-conspirator depots did (1) enter the miscellaneous marine accessory market in the fall of 1973; (2) Respondent did use the May 23, 1972 Consent Judgment as a device to carry out their plan to gain a competitive advantage in the miscellaneous accessories market; and (3) Respondent did use its monopoly power in OMC replacement parts as a means of inherent coercion to gain a competitive advantage in the sale of Non-OMC marine accessories to marine retail dealers. In this action the six (6) Petitioner-Wholesale Distributors were joined as party plaintiffs by twenty-one (21) Retailers, none of whom was a party to the aforesaid May 23, 1972 Consent Judgment.

At the time of the entry of the Consent Judgment, OMC did not market or sell Non-OMC marine accessories. OMC did not announce its entry into the Non-OMC marine accessory market until the fall of 1973.

In the fall of 1972, Respondent was aware that Petitioner-Wholesalers understood that the Consent Judgment of May 23, 1972 would not necessarily terminate their relationship with the Respondent after September 30, 1978. Respondent was aware that Petitioner-Wholesalers anticipated continuing their relationship with Respondent after

that date. Despite having been put on notice of Petitioner-Wholesalers' interpretation of the effect of the Consent Judgment, the Respondent took no steps to take issue with that interpretation and apparently accepted it. It was not until four (4) years later in the fall of 1976 that the Respondent attempted to make use of the Consent Judgment as a device for gaining a monopoly in the wholesale distribution of replacement parts and for gaining a competitive advantage in the marine accessory market.

APPLICABLE DECISION OF THIS COURT

The only applicable decision of this court is *Lawlor* v. *National Screen Service Corp.*, U.S. S. Ct., 1955, 349 U.S. 322, 75 S. Ct. 865.

The facts and holding in the *Lawlor*, supra, case are squarely applicable to the facts in the instant case and squarely in conflict with the Order of the United States Court of Appeals for the Seventh Circuit below.

Both the Court of Appeals and District Court for the Northern District of Indiana below made the same error here that the District Court and Court of Appeals made in the *Lawlor*, supra, case in that they confused course of conduct with cause of action.

In the *Lawlor*, supra, case the defendant was originally charged in a 1942 Complaint with having conspired "to establish a monopoly in the distribution of standard accessories by means of exclusive licenses."

In 1943 that suit was settled prior to trial by the entry of a Consent Judgment in which there were neither findings of fact nor conclusions of law. Pursuant to the settlement the suit was dismissed with prejudice by court order.

As part of the settlement plaintiff received a sub-licens as distributor of standard accessories for three years until 1946 with the renewal then for five additional years.

In 1949 while the sub-license was still in effect plaintiffs again sued the same defendant alleging the same conspiracy to monopolize and alleging among other things that the settlement of the 1942 suit was merely a devise used by the defendant in that case to perpetuate their conspiracy and monopoly.

This Court reversed the application by the District Court and Court of Appeals below of the Doctrine of Res Judicata because the acts being complained of were subsequent to the entry of the 1943 judgment and therefore it constituted a different cause of action. The Court further stated that such application would be contrary to enforcement of the anti-trust laws.

The facts of this case are strikingly similar.

The gravamen of the offense alleged is not as the Appellate Court and the District Court mistakenly assumed, the Respondent's refusal to extend Petitioner-Wholesalers' contracts, it is rather the refusal to sell to any independent wholesaler replacement parts in which Respondent has monopoly power in order to extend its leverage into an entirely different market, namely, marine accessories. Erroneously viewing the matter as a contracts case, the Courts below applied the Doctrine of Res Judicata. When viewed in its true light as a violation of the Federal Anti-Trust Laws as enunciated in the only applicable decision of this Court, *Lawlor*, supra, the Consent Judgment of May 23, 1972 could not confer immunity from a cause of action arising from Respondent's conduct culminating in a refusal to sell to any wholesaler after September 30, 1978.

In 1971 Petitioner-Wholesalers here filed a Complaint alleging a course of conduct by the Respondent in violation of Sections 1 and 2 of the Sherman Act, supra. A settlement was reached which became the subject of a Consent Judgment entered on May 23, 1972, which made neither findings of fact nor conclusions of law. Part of that settlement was an extension of Petitioner-Wholesalers' distribution contracts to September 30, 1978. On February 2, 1977, while their distributor contracts were still in effect, Petitioner-Wholesalers and Petitioner-Retailers brought this action complaining of conduct of Respondent subsequent to the May 23, 1972 Consent Judgment.

Petitioner-Wholesalers contend that even though the conduct subsequent to the May 23, 1972 Consent Judgment may have been part of the same course of conduct, under the decision of this court in *Lawlor*, supra, it was certainly not the same cause of action and therefore the Doctrine of Res Judicata cannot apply for as this court stated in *Lawlor*, supra:

> "acceptance of [Court of Appeals] novel contention would in effect confer on [Respondent] a partial immunity from civil liability for future violations [of the anti-trust laws]." 349 U.S. at p. 329, 75 S.Ct. at 869.

If the District Court and the Court of Appeals misapplied the law as set forth in *Lawlor*, supra, such misapplication is an abuse of discretion, *Milsen Co.* v. *Southland Corp.*, (C.A. 7, 1971) 454 F.2d 363, and warrants this Court in reversing the United States Court of Appeals For The Seventh Circuit's affirmation of the District Court's denial of Petitioners' Application for Preliminary Injunction and ordering the entry of a preliminary injunction.

REASON FOR GRANTING THE WRIT

The order of the United States Court of Appeals for the Seventh Circuit entered on April 12, 1979, is in conflict with the decision of this court in *Lawlor* v. *National Screen Service Corporation,* 349 U.S. 322, 75 S. Ct. 865 (1955).

The purpose of the anti-trust laws is the protection of competition, not competitors, *Brown Shoe Co.* v. *United States,* (U.S. S. Ct., 1962) 370 U.S 294, 344, 82 S. Ct. 1502, 1534, see also *Anti-Trust Procedures and Penalties Act,* 15 U.S.C. § 16(e):

> "Public Interest Determination. (e) Before entering any Consent Judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. . . ."

In *Lawlor,* supra, this court clearly announced that policy in assessing the effect of a Consent Judgment in civil prosecutions under the anti-trust laws for conduct subsequent to the entry of the Consent Judgment. It is the refusal of Respondent to sell replacement parts to any independent wholesaler after September 30, 1978, that is complained of here. The previous Consent Judgment entered on May 23, 1972, cannot in effect confer immunity upon the Respondent from civil liability for a violation of the anti-trust laws and a cause of action arising subsequent to the entry of that Consent Judgment.

It is noteworthy that neither the District Court nor the Court of Appeals below addressed themselves to the basic question here: was the conduct complained of here subsequent to the entry of the Consent Judgment? The record below is clear and unequivocal and was corroborated

by the Respondent's own witnesses that the conduct complained of in this matter took place subsequent to the entry of the Consent Judgment. That being the case, it is a different cause of action and under the holding of this Court in *Lawlor,* supra, the Doctrine of Res Judicata cannot apply even though this cause of action may have been part of the same course of conduct.

CONCLUSION

The Writ of Certiorari should be granted to affirm the holding of this Court in *Lawlor* v. *National Screen Service Corporation,* 349 U.S. 322, 75 S. Ct. 865 (1955): That a Consent Judgment in a case that was never tried and in which there were not any findings of facts nor conclusions of law cannot confer immunity on a defendant from civil liability for future violations of the Federal Anti-Trust Laws under the Doctrine of Res Judicata.

WELCH & AUSTIN

By WILLIAM M. AUSTIN
1111 Grand Avenue
Kansas City, Missouri 64106
816-421-1600

and

SHERIDAN MORGAN
400 Two Crown Center
2420 Pershing Road
Kansas City, Missouri 64108
816-421-6767

Attorneys for Petitioners

Three copies of the foregoing Writ were mailed by U.S. Mail, postage prepaid, on the 6th day of July, 1979, to:

William H. Yager
Butzel, Fruhauf, Keidan, et al.
1990 First National Building
Detroit, Michigan 48226

Barrett, Barrett & McNagny
3rd Floor, Lincoln Bank Tower
Fort Wayne, Indiana 46802
Attorneys for Respondent

WILLIAM M. AUSTIN